BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DEBRA A. LEWIS	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,022,029
M & M MOULDERS	)	
Respondent	)	
AND	)	
	)	
FIRST LIBERTY INSURANCE CORPORATION	)	
Insurance Carrier	)	

ORDER

This claim comes before the Workers Compensation Board upon remand from the Kansas Court of Appeals. The Board heard oral argument on February 9, 2010.

APPEARANCES

William L. Phalen of Pittsburg, Kansas, appeared for claimant. Elizabeth R. Dotson of Kansas City, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the January 4, 2008 Award entered by Administrative Law Judge (ALJ) Thomas Klein and the May 7, 2008 Order entered by the Board.

ISSUES

Claimant initiated this claim alleging a November 5, 2004 accident and injuries to her back, both legs, neck, left arm, left shoulder and "all other parts of the body affected."[1] In the January 4, 2008 Award, ALJ Klein found claimant sustained an 8 percent whole person functional impairment for a lower back injury. Moreover, the ALJ found claimant voluntarily left an accommodated position (in other words, claimant did not make a good

[1] Form E-1 (filed with the Division of Workers Compensation on April 4, 2005).

faith effort to retain her employment). Therefore, the ALJ awarded claimant permanent partial disability benefits based upon her 8 percent whole person functional impairment rating.

Claimant appealed the January 4, 2008 Award to the Board. In its May 7, 2008 Order, the Board modified the Award and found claimant sustained a 5 percent whole person functional impairment due to her November 2004 low back injury. Further, the Board found claimant failed to prove she made a good faith effort to retain her employment with respondent. The wage claimant was earning with respondent was imputed to claimant for purposes of the permanent partial general disability formula in K.S.A. 44-510e and as there was no wage loss, claimant's permanent partial disability was limited to her functional impairment rating. Accordingly, the Board granted claimant permanent partial disability benefits based upon her 5 percent whole person functional impairment.

Claimant appealed the May 7, 2008 Order to the Kansas Court of Appeals. In an Order entered on October 27, 2009, the Court of Appeals reversed and remanded this claim to the Board for further consideration based on the Kansas Supreme Court decision in *Bergstrom*.[2]

Claimant requests the Board to find she sustained a 15 percent whole person functional impairment and that she be awarded a 71.5 percent work disability,[3] which represents a 100 percent wage loss and a 43 percent task loss.

Respondent requests the Board's original award of 5 percent be affirmed and maintains there is no reason for the Board to modify its previous finding as to functional impairment. With regard to work disability, respondent asserts *Bergstrom* is distinguishable from the present case and, further, there is an unresolved question of law as to "whether an injured employee is entitled to a 100 [percent] wage loss under K.S.A. 44-510e(a) when the reason for that wage loss (following resignation from accommodated employment) is not [due to] physical limitations or restrictions resulting from the workplace accident."[4] Respondent also maintains that no appellate court has resolved whether the holding in *Bergstrom* would apply retroactively to a case tried and decided before the *Bergstrom* decision was issued. Should claimant be granted a work disability, which respondent contends should not be granted, respondent contends the Board should find claimant's task loss is 0 percent and the wage loss should be determined only after the

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[2] *Bergstrom v. Spears Manufacturing Co.*, 289 Kan. 605, 214 P.3d 676 (2009).

[3] A permanent partial general disability under K.S.A. 44-510e that is greater than the whole person functional impairment rating.

[4] Respondent's Brief at 4 (filed Jan. 13, 2010).

record has been reopened to determine claimant's employment and wage history after the date of the regular hearing. Further, upon reopening the record, respondent maintains claimant's task loss, if any, also would be an issue.

The issues before the Board on this remand are the nature and extent of claimant's disability and whether the matter should be remanded to the ALJ and/or the record be reopened to determine claimant's task loss.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Board adopts the findings of fact set forth in its Order of May 7, 2008. In that Order, the Board found the claimant failed to prove she made a good faith effort to retain her employment with respondent. Under the *Foulk*[5] and *Copeland*[6] case law in effect at the time, a wage was imputed to claimant for purposes of the permanent partial general disability formula. The Board imputed the wage claimant was earning with respondent and as that resulted in there being no wage loss, claimant's permanent partial disability was limited to a 5 percent whole person functional impairment.

The respondent's argument that *Bergstrom* might not apply retroactively is not persuasive. The principle of prospective and retroactive application applies when a statute changes. *Bergstrom* does not change a statute; it merely interpreted an existing statute.

Thus, the only issue to be determined at this juncture of the proceedings is the nature and extent of claimant's work disability under K.S.A. 44-510e(a) in light of the recent dictates of *Bergstrom*, a case that was issued after the Board considered the ALJ's Award. The Board's finding and conclusion that claimant suffered a 5 percent whole person functional impairment is res judicata and is not an issue on remand from the Court of Appeals. The *Bergstrom* decision abrogated the "good faith" requirement for work disability. Consequently, the Board's analysis must change to conform to the current state of the law.

The test is no longer whether claimant made a "good faith" effort post-injury to retain her employment with respondent and/or to find appropriate employment. Instead, the Kansas Supreme Court in *Bergstrom* said that the fact finder should follow and apply the plain language of the statute. And although respondent most certainly does not agree with the Board's analysis on this point, the Board does not find any legal support for

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[5] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[6] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

respondent's argument that injured claimants should not be given a "free pass" to quit an accommodated job. Quite bluntly, there is no statutory basis for respondent's argument in the law post-*Bergstrom*. The focus is now solely upon the injured claimant's actual wage loss post-injury. The reasons behind the job loss are irrelevant.

Here, it is undisputed that as of the date the record closed claimant was no longer earning a comparable wage. She left respondent's employ and has not found subsequent employment, incurring a 100 percent wage loss. Under the *Bergstrom* rationale, the reasons behind her termination are irrelevant. The focus is now squarely upon claimant's actual wage loss during any period that work disability is claimed. Accordingly, the claimant is entitled to a finding that she bears a 100 percent wage loss as of the date of her termination.

In measuring permanent partial general disability a determination of task loss in addition to wage loss is required.[7] In its May 7, 2008 Order, the Board did not make a finding as to task loss, nor did the ALJ in his January 4, 2008 Award.

At oral argument before the Board on February 9, 2010, the parties were unable to agree to a task loss percentage. Consequently, the claimant requested the Board remand the matter to the ALJ to make a finding as to the task loss percentage. Respondent requested the matter be remanded and in the alternative the record be reopened to determine the task loss issue.

In the interest of justice the Board determines the matter should be remanded to the ALJ and the record reopened for the sole purpose of obtaining Dr. Pat D. Do's opinion as to task loss based on his restrictions previously adopted by the Board.[8] The record need not be reopened for any other purpose.

When the ALJ makes no findings of fact or conclusions of law as to an issue, the Board will not determine the issue. In this instance, the ALJ made no findings or conclusions as to task loss. In addition, the Board concluded in its May 7, 2008 Order that claimant should observe Dr. Do's work restrictions. Accordingly, it is only logical that Dr. Do's opinion as to task loss should be part of the record to be considered by the ALJ when making a conclusion as to task loss.

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[7] K.S.A. 44-510e.

[8] See the Board's May 7, 2008 Order (*Lewis v. M & M Moulders*, No. 1,022,029, 2008 WL 2354919 (Kan. WCAB May 7, 2008)).

The Board orders this matter remanded to the ALJ and the record reopened for the sole purpose of obtaining Dr. Do's opinion as to task loss based on his work restrictions previously adopted by the Board.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the matter be remanded to the ALJ and the record reopened for a finding and Award in accordance with this Order.

IT IS SO ORDERED.

Dated this ____ day of April, 2010.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
Elizabeth R. Dotson, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge